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ADMISSIBILITY OF EVIDENCE UNDER INDIANA'S "COMMON SCHEME OR PLAN" EXCEPTION

INTRODUCTION

In Indiana, as elsewhere,¹ it is generally improper in a criminal trial to introduce into evidence uncharged criminal acts of the defendant in order to show his likely guilt of the crime charged.² To this general rule, Indiana courts have created a host of exceptions,³ one of the most frequently used being invoked where the evidence of other criminal activity concerns the defendant's "intent, motive, purpose, identification or a common scheme or plan."⁴ This "common scheme or plan" exception, expressly recognized in Indiana since 1921,⁵ has grown to such an extent as to obfuscate the general rule of exclusion of other-crimes evidence.

The fundamental problem with admitting such evidence is balancing its potential for harm⁶ against its probative value; this is compounded in Indiana by the confusion of three separate exceptions to the general exclusionary rule. This confusion is attributable to the broad statement of the exception in an early Indiana Supreme Court case,⁷ which has allowed later courts much

¹See C. MCCORMICK, EVIDENCE § 188 (Cleary ed. 1972).

²*E.g.*, *Pierce v. State*, ____ Ind. ____, 369 N.E.2d 617, 621 (1977).

³Exceptions have been found where the evidence shows the *res gestae* of the charged crime, *Land v. State*, ____ Ind. App. ____, 367 N.E.2d 39, 40 (1977); the defendant's guilty knowledge, *Samuels v. State*, 159 Ind. App. 657, 660-61, 308 N.E.2d 879, 881 (1974); the voluntariness of the act, *Schnee v. State*, 254 Ind. 661, 663, 262 N.E.2d 186, 188 (1970); the malice with which the act was done, *Watts v. State*, 229 Ind. 80, 104, 95 N.E.2d 570, 580 (1950); defendant's attempt to conceal the crime, *Bell v. State*, ____ Ind. App. ____, 319 N.E.2d 859, 862 (1974); the defendant's insanity, *Baker v. State*, 190 Ind. 385, 129 N.E. 468 (1921); how defendant came into possession of the instruments of the crime, *Maldonado v. State*, ____ Ind. ____, 355 N.E.2d 843, 847 (1976); the plausibility of the story of the charged crime, *Borolos v. State*, 194 Ind. 469, 478, 143 N.E. 360, 363 (1924); and in sex crimes, although this exception is not settled in the courts: dictum in *Cobbs v. State*, ____ Ind. ____, 338 N.E.2d 632, 633 (1975) seems to limit the evidence to those cases where depraved sexual instinct, specifically incest or sodomy, is at issue, although *Lawrence v. State*, 259 Ind. 306, 310, 286 N.E.2d 830, 833 (1972) found the exception applicable in sex crime cases generally, apparently broadening the rule stated in *Woods v. State*, 250 Ind. 132, 148, 235 N.E.2d 479, 486 (1968), which admits such evidence in prosecutions for crimes involving a depraved sexual instinct or to prove intent in cases of assault with intent to commit rape. See generally C. MCCORMICK, EVIDENCE § 190 (Cleary ed. 1972).

⁴*E.g.*, *Pierce v. State*, ____ Ind. ____, 369 N.E.2d 617, 621 (1977).

⁵*Zimmerman v. State*, 190 Ind. 537, 130 N.E. 235 (1921).

⁶The risks of admission have been summarized as: 1) excessive consumption of time, 2) unnecessary confusion of the issues to be determined, 3) excitation of the jury's emotions to the undue prejudice of the defendant, 4) unfair surprise to the defendant, and 5) unnecessary embarrassment of court personnel, defendant, or the public. Trautman, *Logical or Legal Relevance-A Conflict in Theory*, 5 VAND. L. REV. 385, 392 (1952). See also Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 957-58 (1933).

⁷See note 33, *infra*.

room for creative interpretation. The courts have taken advantage of this opportunity by developing at least three types of common scheme, which have in turn contributed to the growing confusion surrounding the exception and the improper admission of other-crimes evidence.

This note takes the position that the "common scheme or plan" exception, properly applied, is sound and should be retained. However, the exception should be reexamined as to its purpose and application, distinguished from other, conceptually distinct exceptions, and utilized in a manner which protects the interests of accused persons while allowing the state to prove its case with reliable and probative evidence.

THE EXCEPTIONS TO THE GENERAL RULE OF EXCLUSION

The issue underlying the admission of evidence of other crimes is whether its probative value outweighs its potential for harm.⁸ Although Professor Trautman advocates a two-part balancing test to resolve the question,⁹ the trial court's immediate need to decide to admit or exclude such evidence makes the test he proposes unworkable as a practical matter.¹⁰ The statement by the Indiana Supreme Court that "[t]he admissibility of the evidence relating to other offenses presents a question for the sound discretion of the trial court, guided only by very general standards or tests,"¹¹ provides a more workable solution, but, except for one case,¹² the court has offered few, if any, general standards or tests to guide trial courts.

The difficulty created by the need to balance the benefits against the risks of admission is aggravated in Indiana by the confusion of three different exceptions: the "depraved sexual instinct" exception,¹³ the "modus operandi" exception,¹⁴ and the true "common scheme or plan" exception.¹⁵ The confusion of the "common scheme or plan" and the "modus operandi" exceptions with the "depraved sexual instinct" exception¹⁶ is an obvious error of law, and

⁸See note 6, *supra*.

⁹Professor Trautman would have the trial court: 1) determine the logical relevancy (a determination it should make in any offering of evidence), and then 2) balance its probative value against the policy risks, *supra* note 6, at 393.

¹⁰The court would have to check the five-point list, *supra* note 6, totalling the risks it perceives, and then balance this total against its perception of the total probative value of the evidence. Compounding the problem would be the futility in many cases of predicting time consumption and of intuiting the confusion of issues, the undue prejudice, and the potential for embarrassment which could result from admitting the evidence.

¹¹*Gears v. State*, 203 Ind. 380, 385, 180 N.E. 585, 587 (1932).

¹²*Loveless v. State*, 240 Ind. 534, 166 N.E.2d 864 (1960).

¹³See note 3, *supra*.

¹⁴The purpose of such evidence is "[t]o prove other like crimes by the accused so identical in method as to earmark them as the handiwork of the accused." (footnote omitted) *C. McCORMICK, EVIDENCE* § 190, at 449 (Cleary ed. 1972).

¹⁵Evidence falling under this exception is admitted "[t]o prove the existence of a larger continuing plan, scheme, or conspiracy, of which the present crime on trial is a part." (footnote omitted). *Id.*

¹⁶*E.g.*, in *Pierce v. State*, ___ Ind. ___, 369 N.E.2d 617, 621 (1977), a prosecution for kidnapping and commission of a felony while armed, the court said, "All parties agree that the

can be eliminated by more careful application of these exceptions. The distinction between the "common scheme or plan" exception and the "modus operandi" exception is, however, somewhat more elusive in both its ascertainment and effect, and should be squarely confronted and resolved by the court.

The common scheme or plan exception has been recognized in the last half-century by courts, commentators and text writers.¹⁷ Dean McCormick states the purpose of evidence admitted under the exception to be

[t]o prove the existence of a larger, continuing plan, scheme, or conspiracy, of which the present crime on trial is a part. This will be relevant as showing motive, and hence the doing of the criminal act, the identity of the actor, and his intention, where any of these is in dispute.¹⁸

Dean Wigmore would apply the exception when the evidence tends to show "a definite prior design or system which included the doing of the act charged as a part of its consummation."¹⁹ According to Wigmore, "the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed."²⁰

This situation, in which the defendant formulated a plan including two or more criminal acts, is conceptually distinguishable from the modus operandi situation, in which the evidence proves "other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused."²¹ That is to say, there is a difference between two or more crimes being part of a larger scheme or plan (the classic common scheme or plan exception) on the one hand, and a scheme or plan common to two or more crimes (the classic modus operandi exception) on the other. Although, as McCormick says, "the purposes [of the exceptions] are not mutually exclusive, for a particular line of proof may fall within several of them,"²² the criteria for recognizing the applicability of the exceptions, particularly the common

leading case on this issue is *Woods v. State* (1968) 250 Ind. 132, 143, 235 N.E.2d 479, 486" The holding in *Woods*, a rape-incest case, can be found three paragraphs below that cited by the *Pierce* court: "But the testimony of the prosecuting witness . . . falls squarely within the exception to the general rule as to the admissibility of prior criminal acts in cases involving a 'depraved sexual instinct.'" 250 Ind. at 144, 235 N.E.2d at 486. It is unsettling to note that both court and counsel in *Pierce* overlooked this express distinction.

¹⁷E.g., 2 J. WIGMORE, EVIDENCE §§ 300, 304 (3d ed. 1940); C. MCCORMICK, EVIDENCE § 190 (Cleary ed. 1972); Note *Evidence: Admissibility of Evidence of Previous Crime: Instructions to Jury*, 35 CAL. L. REV. 131, 136-37 (1947).

¹⁸C. MCCORMICK, EVIDENCE § 190 (Cleary ed. 1972) (footnote omitted).

¹⁹2 J. WIGMORE, EVIDENCE § 304 (3d ed. 1940).

²⁰*Id.*

²¹C. MCCORMICK, EVIDENCE § 190 (Cleary ed. 1972) (footnote omitted). For a more explicit treatment of this distinction, see Note, *Evidence: Admissibility of Evidence of Previous Crime: Instructions to Jury*, 35 CAL. L. REV. 131, 136-37 (1947) (McCormick cites this note as "Note, 35 COLUM. L. REV. 131 (1935)," *id.* at n.36).

²²C. MCCORMICK, EVIDENCE § 190 (Cleary ed. 1972).

scheme or plan and *modus operandi*, are different and should be kept distinct.

The failure on the part of the commentators to distinguish these criteria is demonstrated by the cases collected by McCormick to illustrate the common scheme or plan exception,²³ as well as in Wigmore's requirement that there "must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*"²⁴

One of the results of this confusion in Indiana is the courts' requirement of a showing of similarity between the crime charged and the crime used in evidence.²⁵ Where the charged crime and the evidentiary crime are parts of a common scheme or plan they might or might not be similar. For example, where defendant is charged with assault and battery on a guard and theft of his uniform, it is obviously probative that he also stole a gun, hijacked an armored car and, posing as the driver of the vehicle, induced a company to transfer to the car its weekly receipts. None of these acts are similar, but they show the motive and intent behind the assault and thus tend to identify the actor. That the criminal acts have occurred over an extended period of time and in places distant from each other does not decrease the relevance of the evidence, since criminal plans often include acts which occur in widely separate places and over a span of many months or years.

On the other hand, where defendant has, through a fraudulent scheme, induced another to part with his money, and later uses the same scheme on another person, it can scarcely be said that the first act was part of a plan of which the other was also a part. In that case, the scheme had not been formulated at the time of the first act; the *modus operandi* is the link connecting the two, and the primary inference from the two crimes considered together is not motive, but identity, guilty knowledge, or the absence of mistake. Thus when defendant, on trial for either act, alleges that he did not commit the crime, evidence that he committed the other in the same way is strongly probative that he did commit the crime charged. In this case, unlike the common scheme or plan situation, the value of the evidence will increase with the singularity of the *modus operandi*, and decrease with the dissimilarity of the various acts and their lack of physical or temporal proximity.²⁶ For

²³*Id.* at n.35. *Makin v. Attorney Gen. of New S. Wales*, [1894] A.C. 57 (1893) is distinguishable, as a *modus operandi* exception, from the other cases cited, all of which are clearly "common scheme or plan" cases.

²⁴J. WIGMORE, EVIDENCE § 304 (3d ed. 1940). Wigmore is not clear about what he means by "a similarity in the results," but if that phrase, and the phrase "a concurrence of common features," are together construed to mean similarity in the *modus operandi*, as was apparently intended, then the confusion under discussion has infected his work also.

²⁵*See, e.g., Maldonado v. State*, ___ Ind. ___, 355 N.E.2d 843, 847 (1976): "[T]his evidence shows a common scheme or plan relevant to appellant's guilt. . . . The robbery sought to be committed in Michigan City resembled the one executed in Evansville in numerous details."

²⁶Although the relative weight of proximity becomes less important as the singularity of the *modus operandi* increases.

this reason, the courts, in balancing the value of the *modus operandi* evidence against its potential for harm,²⁷ have typically required a very high degree of similarity.²⁸

INDIANA CASE LAW

The incorporation of the common scheme or plan exception into Indiana law is built upon, and in some ways parallels, the recognition of the admissibility of other-crimes evidence generally.²⁹ The exception made its Indiana debut in a case³⁰ which cited a New York Court of Appeals decision³¹

²⁷See note 6, *supra*.

²⁸See C. MCCORMICK, EVIDENCE § 190, at n.37 (Cleary ed. 1972); *Biggerstaff v. State*, ___ Ind. ___, 361 N.E.2d 895, 897 (1977). Of course, temporal or physical proximity, when great enough, brings the evidence under the *res gestae* exception, *supra* note 3.

²⁹The Indiana Supreme Court, in *McCartney v. State*, 3 Ind. 353 (1852), recognized that uncharged crimes can and should be used in evidence in some cases. The court cited *United States v. Roudenbush*, 27 F. Cas. 902, 903 (C.C.E.D. Pa. 1932) where, in a lengthy discussion of the matter, the federal court said,

To justify the admission of such evidence of a distinct passing, the notes must be of the same or similar manufacture and appearance (Car. Cr. Law, 195) calculated to lead to the belief that they were of the same character. A man who passes one counterfeit at one time, and a similar one at another, may well be presumed to have known them both to be so; but not when the notes are on different banks, or so unlike in appearance, that an honest man might think one good, though the other was known to be bad. . . . [T]his is an exception from the ordinary rules of evidence in criminal cases, unfavourable to the accused. . . ."

The *McCartney* court's statement of the exception, however, did not deal with the reasoning underlying the exception; it simply held that, "the uttering of other counterfeit notes of the same kind with that charged in the indictment, and about the time that it was passed, may be given in evidence . . . to prove guilty knowledge." 3 Ind. at 354. (*Contra Loveless v. State*, 240 Ind. 534, 539, 166 N.E.2d 864, 866 (1960): "[O]ne crime cannot be proved in order to establish another distinct crime even though they be of the same kind.") This bare-bones statement of the *modus operandi* exception in *McCartney* is correct, but provides the trial court with little guidance (for example, as to the meaning of "kind"), as compared with the more thoroughly explanatory discussion in *Roudenbush*.

One effect of this corner-cutting statement of the *modus operandi* exception was the result in *Beuchert v. State*, 165 Ind. 523, 76 N.E. 111 (1905), a prosecution for receiving stolen goods, namely iron or steel bars stolen from a forge company. The court allowed evidence that watches and jewelry had previously been found in defendant's safe, and the testimony of three witnesses that these items had been stolen from them. The court held:

[I]n trials for receiving stolen goods evidence tending to prove that other stolen goods were found in the possession of the defendant at the time, or prior to the receiving complained of, is competent to be considered with all the other evidence in the case on the question of guilty knowledge. . . . Guilty knowledge may be proved by direct evidence, or by any surrounding facts by which it may be inferred.

165 Ind. at 527-28, 76 N.E. at 113. This holding, although not in exactly the same language as that in *McCartney*, is arguably within its meaning; but the conflict with *Roudenbush*, upon which *McCartney* relied, is apparent. The result is confusion over the degree of similarity required to be shown between the evidence purportedly demonstrating defendant's guilty knowledge in the "other" crime, and the evidence relating to the charged crime.

Another parallel between Indiana's incorporation of the common scheme or plan exception and the general development of the admissibility of other-crimes evidence is discussed at note 35, *infra*.

³⁰*Zimmerman v. State*, 190 Ind. 537, 130 N.E. 235 (1921).

³¹*People v. Molineaux*, 168 N.Y. 264, 61 N.E. 286 (1901).

wherein the exception was discussed at length. The Indiana Supreme Court did not elucidate on the reasoning underlying the exception,³² giving instead a summary³³ of the New York court's recapitulation that, "[g]enerally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish . . . a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others."³⁴

The general history of the admission of other-crimes evidence shows that the result of the simplistic formulation given in Indiana decisions is uncertainty as to the standards for admission of the evidence.³⁵ Likewise, the shift-

³²*E.g.*, quoting from H. UNDERHILL, CRIMINAL EVIDENCE § 88 (2d ed. 1910), the New York court said:

'[T]he two must be connected as parts of a general and complete scheme or plan. . . . Hence on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. . . . Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. . . . If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence rejected. . . . ' The compendium just quoted . . . is so accurate and concise that no other text writers will be cited, although there are many of them. There is, indeed, no room for discussion in regard to the general principles. . . .

168 N.Y. at 305-06, 61 N.E. at 299.

³³[W]hen the act constituting the crime has been established, then *any evidence tending to show motive, intent, or guilty knowledge, if in issue, or evidence which directly or as a natural sequence tends to show the defendant guilty of the crime charged, is competent, although it also tends to show him guilty of another and distinct offense.*

Zimmerman v. State, 190 Ind. 537, 542, 130 N.E. 235, 237 (1921) (emphasis added). This statement, in allowing *any* evidence, does not look to any of the five dangers cited in note 6 *supra* nor does it hang upon the evidence any threshold requirements of reliability, such as a showing of a larger plan, focusing instead solely upon whether the evidence tends to show a motive. (The vague phrase requiring a direct or naturally following showing of defendant's guilt is used in the disjunctive, and expands, rather than restricts, the amount of evidence admissible at trial.)

³⁴*People v. Molineaux*, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).

³⁵Most notable in this regard is the question whether, where the offered other-crimes evidence is probative of defendant's knowledge, intent and the like, his charged acts must be equivocal as to that state of mind. That is, where the acts could only have been performed with guilty knowledge, such as solicitation of a bribe, Indiana courts have been inconsistent in ruling on admissibility of evidence of other, similar acts. *See, e.g.*, *Strong v. State*, 86 Ind. 208, 214-15 (1882) (obtaining money by false pretenses; held, where charged crime "carries with it the evident implication of a criminal intent," other-crimes evidence inadmissible); *Crum v. State*, 148 Ind. 401, 412-13, 47 N.E. 833, 837 (1897) (grand larceny; expressly overruling *Strong*; unnecessarily broad holding, as it is competent, in a larceny prosecution, to show the defendant's intention to convert the proceeds to his own use. *Axtell v. State*, 173 Ind. 711, 713, 91 N.E. 354, 355 (1910).); *Kahn v. State*, 182 Ind. 1, 3-4, 105 N.E. 385, 386 (1914) (arson; other-crimes evidence inadmissible where charged act unequivocal); *Vandever v. State*, 256 Ind. 509, 511, 269 N.E.2d 865, 866 (1971) (bribery; although other-crimes "evidence is admissible only where . . . motive, malice intent or guilty knowledge . . . is an issue," evidence of earlier solicitations "tends to show both intent and guilty knowledge."); *Duvose v. State*, 257 Ind. 450, 452, 275 N.E.2d 536, 537 (1971) (rape and kidnapping; evidence of rapes in Pennsylvania inadmissible as not relevant "to any point in issue to the case. . . ."); *Stone v. State*, 258 Ind. 281, 281 N.E.2d 799 (1972) (forgery; evidence of uttering four other forged checks, payable to defendant, admissible (although not particularly probative as to identity, since three of those receiving them could

ing, vague use of the common scheme or plan exception specifically threatens to create an "anything goes" policy in those cases where even the most tenuous relationship can be found, or manufactured, between or among the crimes.

At present, common scheme or plan crimes in Indiana fall into at least three categories: 1) The charged crime and the "other crime" are both parts of a prior plan which includes them both. This is the true exception, and shows the motive behind the charged crime, although identity, *mens rea*, and other elements may be inferred. 2) The *modus operandi* of the "other crime" is the same as that of the charged crime. When correctly applied, this *modus operandi* exception tends to prove, for example, the identity, intent, or guilty knowledge of the actor, and therefore requires a high degree of similarity between the crimes. 3) The "other crime" is of the same general type as the charged crime, and was committed in the same general area. The courts hold that this shows a common scheme or plan to commit that type of crime against a class.³⁶

The result of the muddling of the first two subdivisions is misapplication of both exceptions, so that neither accomplishes the purpose for which it was created. The third category is more threatening because its potential for misuse by courts and prosecutors is great, and it is at odds with several basic values and policies of our legal system.³⁷

An early example of the use of the *modus operandi* exception under the name of the common scheme of plan exception is *Gears v. State*,³⁸ a prosecution for grand larceny.³⁹ Gears was charged with the theft of fifty chickens; at the site of the theft were found unusual footprints and automobile tire tread marks, which were also discovered at the scenes of a

not identify him as the utterer while the cashier in the act charged, who had known him since his childhood, could; nor particularly probative as to guilty knowledge, since that could be inferred from the fact that check was payable to defendant and drawn on account of stone company defunct for more than a decade); *Lawrence v. State*, 259 Ind. 306, 310, 286 N.E.2d 830, 832-33 (1972) (admissible if "relevant to some issue in the case"); *Trinkle v. State*, 153 Ind. App. 524, 530, 288 N.E.2d 165, 169 (1972) ("evidence of prior offenses which tends to show a common scheme or plan is properly admissible."). Perhaps the courts' inconsistency over whether other-crimes evidence will be admitted even when the act precludes an innocent intent can be at least partially attributed to the West Reporter System's headnotes, which have passed over this apparently subtle point. See, e.g., *Kahn v. State*, 105 N.E. 385 (1914) (headnote 1); *Carpenter v. State*, 131 N.E. 375 (1921) (headnote 1). Judges and attorneys under time strictures may well lose this distinction, also. See also note 29, *supra*.

³⁶E.g., *Kindred v. State*, 254 Ind. 127, 258 N.E.2d 411 (1970).

³⁷See, e.g., *Lovely v. United States*, 169 F.2d 386, 388 (4th Cir. 1948):

Of what avail would be the rule that the character of a defendant on trial may not be attacked unless he puts it in issue, or that an accused's denial on cross examination of criminal conduct inquired about for purpose of impeachment may not be contradicted except by the record of conviction, if it were permissible to introduce parol evidence of other crimes merely for the purpose of showing the accused to be a man of bad character likely to commit the crime charged?

³⁸203 Ind. 380, 180 N.E. 585 (1932).

³⁹*Gears* was also instrumental in the creation of the third category. See text at note 55 *infra*.

later chicken theft and a subsequent attempted chicken theft. Gears was connected with the attempt by other evidence, and the second and third crimes were used as evidence of his involvement in the first. The court, ruling on the admissibility of the evidence of the later theft and attempt, held that it "substantially tended to identify the defendant as the perpetrator of the crime charged, and also to show a scheme or plan to commit a series of acts of larceny which included the crime charged."⁴⁰ That the evidence was competent and should have been admitted is clear, as it identified the actor through the distinctive association of his peculiar footprint with the unusual tire tread marks. It is equally clear, though, that the evidence showed, not a *plan* to commit a series of acts of larceny, but the mere fact that Gears *had* committed a series of acts of larceny. The results of the case are correct, but the court's confusion of *modus operandi* with common scheme or plan is evident.

Seven years later in *Hergenrother v. State*,⁴¹ an armed robbery case, the court properly refused to admit evidence which seemingly should have been admitted under the *Gears* interpretation of the common scheme or plan exception. An alleged accomplice had been permitted to testify that, within the three days prior to the commission of the charged offense, he and the defendant had robbed or tried to rob three persons. After quoting *Gears* extensively, the court held the evidence inadmissible and clearly interpreted *Gears* as an example of the *modus operandi* exception,⁴² spurning the chance to find, in the method of the *Gears* court, a "plan to commit a series of acts."⁴³ *Hergenrother* thus tried to limit *Gears*' expansive interpretation of the legal meaning of a common scheme or plan.

Concurrent with the development of the plan-to-commit-a-series-of-crimes criterion for admission of other-crimes evidence was the evolution of another criterion, which relied upon the commission of crimes against a class of which the victim was a member. This standard originated in *Peats v. State*,⁴⁴ in which appellant, a member of the Teamsters Union, had been convicted of the voluntary manslaughter of a nonunion truck driver, and in which the evidence showed a prior plan to attack nonunion truck drivers in

⁴⁰*Gears v. State*, 203 Ind. 380, 386, 180 N.E. 585, 587 (1932).

⁴¹215 Ind. 89, 18 N.E.2d 784 (1939).

⁴²

[T]he evidence . . . failed to show any similarity in the method used that would in any way tend to prove that the person who committed those crimes was the same person who committed the robbery laid in the affidavit. . . . We can not see any relevancy, or probative force whatever in the evidence, objected to. It did not tend to prove any essential element of the crime charged, and could have but one purpose and effect, and that was to prejudice the appellant in the minds of the jury.

Id. at 95-96, 18 N.E.2d at 787.

⁴³The court's analysis may have been aided a bit by other testimony: "Evans Peak, the attendant of the filling station [and whom defendant was charged with robbing], testified that appellant was not the person who held him up and robbed him . . . but that [the alleged accomplice] was the person." *Id.* at 96, 18 N.E.2d at 788.

⁴⁴213 Ind. 560, 12 N.E.2d 270 (1938).

the area. The evidence was admitted as showing motive, malice and intent.⁴⁵

This "scheme against a class" language was invoked again in *Kallas v. State*,⁴⁶ a first-degree murder case in which the defendant, a homosexual, allegedly had invited the male decedent to his hotel room for drinks. The state was allowed to present evidence of "various prior specific acts . . . of perversion perpetrated by the appellant upon boys and young men other than the decedent."⁴⁷ The court found that "this chain of events evidenced appellant's design, scheme, plan, system and intention to satisfy his grossly abnormal sexual impulses,"⁴⁸ and that "[p]roof of his particular abnormal mental condition was circumstantial evidence of his motive and intent in luring the decedent to his room and then killing him."⁴⁹ The *Kallas* court, in mistakenly relying upon the "plan against a class," rather than the essential "prior plan," element of the *Peats* holding, created a new criterion for the application of the common scheme or plan exception: "Where there is a common purpose and design by way of a conspiracy⁵⁰ to assault a class of persons, other offenses are relevant and may be admitted in evidence."⁵¹

The next year, the court tied the ill-conceived scheme against a class criterion to the incorrectly applied plan to commit a series of crimes criterion, in *Watts v. State*.⁵² *Watts* was a prosecution for first-degree murder and murder while attempting rape in which the court held admissible evidence of prior rapes and rape attempts, and the testimony of a woman who escaped Watts by running from her home after he had ordered her at knifepoint to disrobe. The evidence was correctly ruled admissible because it

⁴⁵This approaches the sound application of the common scheme or plan exception. The state shows the scheme's existence and other crimes committed in furtherance of that scheme, and the jury then assesses the probability of the defendant's guilt. Its weakness is that, even given this evidence, it is not unlikely that another has committed the charged crime. If the prior plan could not have been executed without the charged crime, and if the plan had demonstrably been executed, the common scheme or plan exception would have been available.

The evidentiary and charged crimes in this kind of case are likely to be very similar, but similarity does not influence the admissibility of the evidence; rather, if the similarity is so great as to lead to the conclusion that all of the acts must have been performed by the same actor, the evidence could have been admitted under the *modus operandi* exception.

⁴⁶227 Ind. 103, 83 N.E.2d 769 (1949), *cert. denied*, 336 U.S. 940 (1949).

⁴⁷*Id.* at 113, 83 N.E.2d at 773.

⁴⁸*Id.*

⁴⁹*Id.* at 122, 83 N.E.2d at 777. While his homosexuality may have shown a motive and intent for "luring" his victim to his room, it is not clear how this evidences either a motive or intent to kill.

⁵⁰It is unclear why the court chose to include conspiracy language here, as there was no conspiracy involved, and the language seems not to be required by an interpretation of *Peats*. In fact, the court by the use of this word achieved the remarkable result of not only making bad law, but misapplying it to the facts of the case at bar.

⁵¹227 Ind. at 113-14, 83 N.E.2d at 773. A major distinction between *Peats* and *Kallas* is that in the former the inference is easily and readily drawn, whereas in the latter, a prosecution for homicide, and inference of homicidal intent is at the least very difficult to draw from evidence of homosexuality, or even evidence of "indecent assaults." See note 32, *supra*, and accompanying text.

⁵²229 Ind. 80, 95 N.E.2d 570 (1950).

"tended to prove intent, malice, and identity."⁵³ However, the court incorrectly stated that the evidence "revealed a definite plan, system, and scheme against a class of which the deceased was a member."⁵⁴

Watts thus combined in one decision the worst features of two lines of cases: from *Gears* it took the "plan to commit a series of acts of [a type of crime],"⁵⁵ and from *Kallas* the "design . . . to [commit a crime upon] a class of persons."⁵⁶ This is unfortunate for two reasons: first, it was completely unnecessary because the modus operandi exception could properly have been relied upon to admit the evidence; and second, the court's vague reference to a "plan, system, and scheme against a class"⁵⁷ facilitates misuse of the exception. The problem with this scheme against a class formulation is that, if carried to its logical extreme, a class could ultimately become "humanity."⁵⁸

The subtle broadening of these spurious criteria was demonstrated in *Kindred v. State*,⁵⁹ a prosecution for forgery. Kindred had allegedly obtained \$50 from a bank by presenting to the teller another man's credit card and forging his signature. Although the teller could not identify Kindred at trial,

⁵³*Id.* at 104, 95 N.E.2d at 580. This is, of course, the modus operandi exception, properly exercised here because of the concurrence of several distinguishing features, such as the type of truck driven by the actor and the area and time of day characteristic of the acts.

⁵⁴*Id.* at 103, 95 N.E.2d at 579. There is no "plan, system and scheme" revealed here, in the sense of the actor's having plotted his acts in advance, although the use of the word "system," isolated from "plan" and "scheme," is justified; but this then becomes the modus operandi exception, an interpretation inconsistent with the rest of the sentence.

⁵⁵*Id.*

⁵⁶The *Watts* court also cited *Borolos v. State*, 194 Ind. 469, 143 N.E. 360 (1924), to support its "scheme against a class" standard. 229 Ind. at 103, 95 N.E.2d at 579. The *Borolos* holding, however, was that

where the evidence discloses a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, or offers and explanation of facts that, unexplained, would tend to discredit the evidence introduced by the state, evidence of other crimes than the one charged in the indictment is sometimes admissible; and this rule is particularly applicable to trials for sexual offenses.

194 Ind. at 473, 143 N.E. at 361. The *Borolos* court found that the other-crimes evidence there both explained the witnesses' hesitation to come forward, and rebutted "an inference that the story they told was too improbable to be true." *Id.* at 478, 143 N.E. at 363. Too, *Borolos* was a homosexual sodomy case, and therefore within the depraved sexual instinct exception; see note 3, *supra*.

⁵⁷229 Ind. at 103, 95 N.E.2d at 579.

⁵⁸The *Watts* court never specified what "class" it contemplated: was it women, women at home during the day, white women (Watt's fellow prisoners testified that he "told them . . . that she was not the only white women he had been with . . .") *Id.* at 100, 95 N.E.2d at 578), or someone else? The court, in *Loveless v. State*, expressly recognized another danger:

We point out that in the *Kallas Case* the statement that "where there is a common purpose and design" evidence of other similar crimes is admissible, must be limited to the particular facts of that case, namely, sexual assaults. To use the term "common purpose and design" out of the context of that case would enlarge the general rule to the point where a person could be charged with a specific crime and yet evidence of a general conspiracy involving numerous other crimes be presented at trial, to his surprise and prejudice.

240 Ind. 534, 541, 166 N.E.2d 864, 867 (1960).

⁵⁹254 Ind. 127, 258 N.E.2d 411 (1970).

she knew that he had been wearing a new yellow jacket. A local merchant testified that Kindred on the same day had bought from him several articles, among them a new yellow jacket, using the same credit card in that transaction. Pointing out that the merchant's testimony and the sales slip with the credit card number on it were probative of the identity of the forger, the court found that the "evidence also tended to show a scheme and plan on the part of the appellant to use the credit card to obtain merchandise and money in the local community."⁶⁰ Once again, there was no need for so broad a ruling, since the *modus operandi* exception was available. *Kindred* is thus another step in the expansion of the criteria applied to admit other-crimes evidence; it is not a long step from "us[ing a] credit card to obtain money and merchandise" to, for example, "making misrepresentations," or from there to "perpetrating crimes." There is ultimately no difference between admitting evidence to show that a defendant had previously perpetrated crimes upon humanity, on the one hand, and admitting it to show that defendant was simply a person of bad character, on the other.

Loveless v. State

Among the Indiana cases treating the common scheme or plan exception, Chief Justice Arterburn's opinion in *Loveless v. State*⁶¹ stands out as a lucid attempt to deal with many of the difficulties in the case law of the exceptions to the general exclusionary rule. Loveless had been convicted of the second-degree robbery of a service station. Admitted into evidence was the testimony of his former codefendants, who had pleaded guilty: that they had also burglarized a hardware store, a service station, and a grocery store, all four burglaries occurring in or near different towns; that Loveless had urged them to commit the robberies; that he would dispose of the property at his place of business; and that certain items from some of these burglaries were found at his truck stop. The court found that the evidence of possession of the fruits of other burglaries had "no materiality in the case unless evidence of other crimes in which that property was taken was competent for some proper reason."⁶² As to the other evidence of other crimes, the court responded to the state's contention that this showed a common scheme or plan to burglarize various places:

If this be true, it seems to us that "a common scheme or plan" such as that claimed by the State, would present a crime of conspiracy and such a crime could have been properly charged[,] . . . the full scheme and plan could have been developed in the evidence [, and] . . . appellant would have been properly advised and informed of the nature of the charge against him.⁶³

⁶⁰*Id.* at 133, 258 N.E.2d at 415.

⁶¹240 Ind. 534, 166 N.E.2d 864 (1960).

⁶²*Id.* at 538-39, 166 N.E.2d at 866.

⁶³*Id.* at 538, 166 N.E.2d at 866.

The court ruled the evidence inadmissible because "[s]uch evidence is highly prejudicial. Moreover, a defendant is entitled to be informed specifically of the crimes charged and not come to trial in the dark and uninformed as to the nature of the evidence to be presented against him."⁶⁴ The court then reviewed the general grounds for admission of evidence of other crimes, and found them all inapplicable.⁶⁵

It is difficult to reconcile several recent Indiana decisions with the *Loveless* rationale.⁶⁶ In *Pearson v. State*,⁶⁷ the defendant was on trial for the theft of a suit which she had put in a footlocker and, using an assumed name, attempted to ship by bus out of the state. The Court of Appeals dismissed her objection to the admission of testimony that on the day before the charged act and attempted shipping she and two others had shipped another footlocker by bus out of the state using an assumed name. The court held, "Pearson asserts that this testimony was prejudicial and irrelevant but fails to cite any authority . . . to support the argument. However, the evidence would have been relevant to show a common scheme or course of conduct."⁶⁸

In *Dorsey v. State*,⁶⁹ defendant was convicted of first-degree burglary. The state's witness was allowed to testify to his commission, with Dorsey, of approximately fifteen burglaries in the month preceding the act charged, and to the modus operandi used, although the court of appeals did not report the details. The court tersely held: "Such evidence tended to establish a common scheme or plan and was therefore within the exception to the rule rendering

⁶⁴*Id.* at 539, 166 N.E.2d at 866. These are but two of at least five dangers of admission of other-crimes evidence. See note 6, *supra*.

⁶⁵*Id.* at 539-40, 166 N.E.2d at 866-67. The court also noted a possible constitutional question as to the admissibility of other-crimes evidence. *Id.* at 541, 166 N.E.2d at 867.

⁶⁶Adding confusion of issues and undue consumption of time to the two risks mentioned in *Loveless* (undue prejudice, unfair surprise) makes the task substantially more difficult yet.

⁶⁷___ Ind.App. ___, 339 N.E.2d 800 (1976).

⁶⁸*Id.* at 802. Even assuming *arguendo* that the earlier shipping showed a "common scheme," as opposed to a scheme in common, the scheme "proved" could only be one to ship footlockers out of state by bus under an assumed name, whereas the crime charged was theft. Moreover, notwithstanding that the evidence does not show a true common scheme or plan, and notwithstanding that the scheme seen by the court is not one to commit the crime charged, it is still not clear what inference a fact finder could draw from the evidence, since it is not shown what the first footlocker held. Because the state presented the evidence at all, a juror would be forced to infer, it seems, that the first footlocker contained stolen goods or some other item which it should not; thus, a presumably innocent act may well have contributed to Pearson's conviction.

A more recent example of an innocent act being used as evidence to prove a defendant's guilt can be found in *Pierce v. State*, ___ Ind. ___, 369 N.E.2d 617 (1977), where the court also relied on the common scheme or plan exception to admit evidence of a presumably non-criminal act. In a remarkably circuitous opinion as to this evidence, the court found that defendant's intentions toward and actions with the victim were inferable from his actions and intent as to another person, which could be inferred from his actions and intent with the victim. *Id.* at 621.

⁶⁹___ Ind.App. ___, 357 N.E.2d 280 (1976).

prior criminal conduct other than that charged inadmissible on the question of guilt."⁷⁰

Loveless has not been quietly overruled by the court of appeals alone; the Indiana Supreme Court has also been chipping away at its interpretation of the exception. *Maldonado v. State*⁷¹ and *Biggerstaff v. State*⁷² both arose from the same fact situation, and each resulted in the defendant's conviction on two counts of armed robbery. The charged offense was planned by Maldonado, Biggerstaff, and two others, Corbett and Svvara. Maldonado went to the victims' home in Evansville, Indiana, posing as a salesman. Finding no one at home, he broke in the front door. When the two residents returned, Maldonado and Biggerstaff handcuffed them, bound them with duct tape, and gagged them. Both men were armed. Admitted into evidence was Svvara's testimony that Biggerstaff, Maldonado and he had earlier planned the robbery of a Michigan City, Indiana, home, to be effected by Svvara's posing as a salesman in order to gain entry, then binding the occupants with duct tape, after which the other two would enter and aid in the robbery. To accomplish this, Svvara testified, he had been given an attache case, duct tape and a pistol. Finding no one at home, however, Svvara left and the plan was abandoned. Svvara was also allowed to testify, at the *Maldonado* trial, that before going to Evansville, he and Maldonado had planned an armed robbery of a drapery store in which they would pose as customers, handcuff and tape their victims, and rob them.

The *Maldonado* court never specifically explained the admissibility of the testimony relating to the plans to rob the drapery store, so it must be assumed that it felt its reasoning on the evidence of the Michigan City attempt equally applicable to those plans. As to the Michigan City attempt, the court vaguely found a "common scheme or plan relevant to appellant's guilt of the offense charged. . . ."⁷³ The court reasoned that the Michigan City attempt "resembled the one executed in Evansville in numerous details,"⁷⁴ referring to the method of entry and the use of handcuffs, duct tape, and a pistol with silencer.⁷⁵ The opinion failed to deal with the facts that the Michigan City attempt was abandoned when the home was found empty, Svvara was to pose as the salesman in the Michigan City robbery, while in Evansville Maldonado was to be the actor, the duct tape used in Evansville was only similar to that to be used in Michigan City, and none of the devices used was particularly unusual for such a crime.

⁷⁰*Id.* at 284. The court relied upon two cases: *Cobbs v. State*, ____ Ind. ____, 338 N.E.2d 632 (1975) (rape; other-crimes evidence is admissible if tending to show intent, motive, purpose, identity, or common scheme or plan; here, relevant to identity); *Thompson v. State*, ____ Ind.App. ____, 319 N.E.2d 670 (1974) (rape; evidence of defendant's modus operandi admissible as showing common scheme, design or plan).

⁷¹*Maldonado v. State*, ____ Ind. ____, 355 N.E.2d 843 (1976).

⁷²____ Ind. ____, 361 N.E.2d 895 (1977).

⁷³355 N.E.2d at 847.

⁷⁴*Id.* This is, of course, modus operandi language.

⁷⁵*Id.*

These dissimilarities take on more meaning when viewed in the light of the reasoning the court used a year later in ruling admissible essentially the same evidence in *Biggerstaff*: "As an exception to the general rule [of exclusion], prior crimes that are nearly identical in method are admissible. This exception requires much more than mere repetition of similar crimes; 'The device used must be so unusual and distinctive as to be like a signature.'"⁷⁶ This is, again, the *modus operandi* exception, not the common scheme or plan exception. Also, where the court had in *Maldonado* found a "resemblance," in *Biggerstaff* it found facts "so unusual and distinctive as to be like a signature." The *Loveless* concern for properly charged crimes⁷⁷ was ignored.⁷⁸

The uncertain, erroneous, and inappropriate application of the common scheme or plan exception in Indiana has ominous potential for the administration of criminal justice. A defendant who must counter other-crimes evidence incorrectly admitted against him must, in effect, overcome a presumption of guilt created by a showing of the defendant's bad character.⁷⁹

⁷⁶361 N.E.2d at 897. The *Biggerstaff* court's requirement of much more than similarity is the same as a requirement of much more than resemblance; yet, in *Maldonado*, evidence of the attempt was admitted because it "resembled the one executed . . . in numerous details." 355 N.E.2d at 847.

⁷⁷See note 58, text at note 61, *supra*.

⁷⁸Also, confusion of issues and undue time consumption are evident. This evidence came from Svara's testimony in *Maldonado*, 355 N.E.2d at 846, and in *Biggerstaff*, 361 N.E.2d at 897; the alternative to admitting his testimony as to the other plans was limiting it to the charged crime, and this should have been done. The value of the evidence of the plans was directly related to his credibility as a witness and, if his credibility was expected to be high enough to persuade the jury of the truth of his testimony, it must also have been expected to be high enough to make believable his assertions that Maldonado and Biggerstaff were guilty. Since the evidence of the other criminal activity could have added little, if anything, to testimony limited strictly to the charged offense, it could scarcely have been of sufficient value to outweigh the risks of its admission. See note 6, *supra*.

⁷⁹See *People v. Molineaux*, 168 N.Y. 264, 337-38, 61 N.E. 286, 311 (1901) (O'Brien, J., concurring). This seems to have been the goal of at least one dissenting judge ("I think the reason of the rule [allowing other-crimes evidence, to show guilty knowledge,] applies with peculiar force to a case, such as this, of an imposter who goes about the country imposing upon others by a systematic scheme, of which the particular act is but one of a long series of like criminal acts performed in execution of a formed and continuous design to defraud communities." *Strong v. State*, 86 Ind. 208, 219 (1882) (Elliott, J., dissenting in an opinion cited as an "able dissenting opinion" which "correctly expresses the law on this question," *Crum v. State*, 148 Ind. 401, 412, 47 N.E. 833, 837 (1897)) (no evidence of any such occurrence other than that charged and that at issue is mentioned in either the majority opinion or the dissent) and one court ("No more detestable crime could be committed against the good order of society. The acts done by appellants made up a combination of cheating, lying, stealing, and breach of confidence, tending to make all honest, simple-minded people suspect every polite stranger they meet with, and even to distrust their own friends and neighbors. Such a crime against society should be most severely punished. . . . [T]hree years' or five years' imprisonment . . . was not an adequate punishment. . . . The fact that the credulous, simple-minded prosecuting witness was himself willing to aid in circulating counterfeit money does not lessen the guilt of his tempers, any more than did the weakness of the denizens of Eden excuse the villainy of the arch fiend who corrupted them." *Crum v. State*, 148 Ind. 401, 413, 47 N.E.833 837 (1897) (larceny)), although similar language has not been found in the more recent cases.

Although the tactic of introducing other-crimes evidence has created constitutional questions for two Chief Justices,⁸⁰ it does not seem to violate the letter of the constitution, but only the spirit.⁸¹

CONCLUSION

The common scheme or plan and *modus operandi* exceptions to the general rule prohibiting the proof of uncharged crimes in a criminal trial to show the defendant's guilt of the charged crime are useful when correctly applied, and the benefits of such evidence outweigh the risks of its use. To maximize the benefits and minimize the risks, however, these exceptions must be appreciated by the courts in both their objectives and the respective criteria for their use. Indiana courts have generally failed in this regard. The courts have confused these two with each other, as well as with the automatically inclusive depraved sexual instinct exception, resulting in a murky hodgepodge of general admissibility.

The solution to the problem will lie in Indiana courts' recognition of both the ends to be attained by admission of competent, relevant other-crimes evidence, and the criteria to be used in deciding the applicability of one or more of the common-sense exceptions to the rule of inadmissibility. The depraved sexual instinct test, which results in the automatic admission of evidence of other incidents of incest or sodomy, where one or both of those are charged, must be strictly limited to such crimes. The *modus operandi* exception must be limited to those trials where the *modus operandi* is so

⁸⁰Chief Justice Arterburn warned, in *Loveless v. State*, 240 Ind. 534, 541, 166 N.E.2d 864, 867 (1960), against enlarging the exception

to the point where a person could be charged with a specific crime and yet evidence of a general conspiracy involving numerous other crimes be presented at trial, to his surprise and prejudice. It is a constitutional principle that a defendant is entitled to be informed specifically of the crime charged so that he may prepare an adequate defense. Constitution of Indiana, Article 1, Section 13.

Chief Justice Buskirk, in *Fletcher v. State*, 49 Ind. 128 (1874), said:

It is worthy of notice, that the words "offence" and "accusation" are used [in the constitution] in the singular. . . .

The evident purpose of such constitutional provision was to guard and protect the rights of a person accused of crime, and to prevent him from being prejudiced in the defence of one crime by evidence tending to prove that he had been guilty of another and distinct crime.

⁸¹A challenge based on the language of the constitution faces several obstacles. A defendant is, strictly speaking, informed of the charged crime by a properly drafted indictment or information, although he is not thereby informed of the other crimes of which he will be accused in court. A narrow reading of "offense" and "accusation," as proposed by Chief Justice Buskirk, *supra* note 80, proves too much, since it illegitimizes joinder and thus runs afoul of the policy of prosecutorial discretion. A nontechnical interpretation of "charge" and "accusation" to mean charging or accusing in court also proves too much, since it would eliminate all of the other-crimes exceptions where defendant has not been apprised of the state's intention to use such evidence and has not had adequate time to prepare to meet it.

The only constitutional complication, then, arises from the underlying philosophy of fairness to the defendant, who must defend, at potentially great expense, against allegations of crime which he did not expect and which are sure to influence the minds of the jurors.

unusual as to preclude a reasonable possibility that the crimes were committed by different persons, and courts should consider the temporal and geographical closeness of the charged and uncharged crimes. The common scheme or plan exception must be revamped to contemplate an initial plan which included the commission of the charged and uncharged crimes, thus showing the motive for the former, while eliminating the need for any similarity or proximity in the crimes. The common scheme or plan, to be probative, must require the commission of the charged crime for its effectuation and should be proved to a greater degree of definition of its scope than a scant plan to commit a series of crimes upon a class of persons, which is nothing more than proof of bad character.

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